UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FRONT RANGE EQUINE RESCUE, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Civ. No. 1:13-cv-00639-MCA-RHS**
TOM VILSACK, Secretary, U.S. Department of Agriculture, *et al.*,	)	
Federal Defendants.	)	**VALLEY MEAT COMPANY, LLC's RESPONSE TO PLAINTIFFS' MOTION TO MODIFY THE TEMPORARY RESTRAINING ORDER AND OBJECTION TO MAGISTRATE'S ORDER REQUIRING INJUCTION BOND**

INTRODUCTION

The Plaintiffs' Motion to Modify the Temporary Restraining Order and Objection to the Magistrate's Order Requiring Injunction Bond is fatally flawed and should be denied for the following summarized reasons:

1. **Plaintiffs' Motion is factually and legally incorrect.**
2. **Plaintiffs', by their own admissions, have displayed to the Court that this injunction by so-called "public interest groups" has been sought in attempt to hijack NEPA in order to procedurally block the substantive long standing law (the Federal Meat Inspection Act has been in existence and contemplated the processing of equines since 1906) with which they disagree, which does in fact provide for the lawful, humane, and safe processing of equine animals for human consumption. In reality the self-**

determined public interest group of Plaintiff HSUS is actually the holder of the rights to a contraceptive for horses derived from the slaughter of hogs (*porcine zone pellucida)*[1] and has a financial stake in the outcome of this litigation therein benefiting from the setting aside the Grants of Inspection of Intervenor Real Parties in Interest Valley Meat Company, LLC, Responsible Transportation, Rains Natural Meats, and Chevaline, LLC.

3. **Plaintiffs' fail to realize that the Grants of Inspection issued to Valley Meat Company, LLC and Responsible Transportation that Plaintiffs' requested be set aside constitute a vested property interest in the form of a license issued to those companies to conduct a lawful business.**

ARGUMENT

First and foremost the misrepresentative statements and discussions of facts by Plaintiffs should be addressed by this Court and are good cause for this motion to be denied in and of themselves. The most glaring misstatement made over and over (even when Plaintiffs knows it is not the case) is that Valley is not able to operate because they do not have a ground water discharge permit. It is beyond perplexing as to why counsel for the plaintiffs continues to make this tired statement. It is legally inaccurate and factually simply not the case. Valley only requires a groundwater discharge permit to discharge into a lagoon as has been discussed. If Valley is not discharging into its lagoons, but is instead disposing of wastewater in another fashion such as hauling to a licensed facility it does not require a groundwater discharge permit to operate. (Valley has discussed this with the New Mexico Environment Department and they have

[1] http://www.humanesociety.org/issues/wildlife_overpopulation/facts/is_pzp_safe.html

publically acknowledged the same) **Hence, Valley is not barred from operating and absent the injunction of this court would be operating today.** However, this particular misstatement by plaintiffs belies a much larger fatal flaw in Plaintiffs' discussion of the facts, because while plaintiffs allege in their motion "plaintiff did not bring any legal claims concerning the conduct of VM or RT and did not seek any remedies against them" *FRER Mot. at pg 5,* plaintiffs have, in reality, offered salacious proffers of Valley's conduct at every opportunity as support for the alleged environmental harm that horse slaughter would create therein being a cause for this court to issue the TRO and the PI. Plaintiffs actually misrepresented to the court that they seek no remedy from Valley Meat Company when in reality, Valley Meat Company is one of the real parties in interest from whom they seek to strip away a vested license that Valley has in form its issued Grant of Inspection.

Further, plaintiffs incorrectly offer to the Court that statements made to the press in estimation of production levels were facts to be relied upon instead of sworn statements through affidavits based upon actual calculations and contemplated contracts. The reality of the facts may be difficult for plaintiffs to come to grips with, but that does not change the fact that the sworn statements are the ones that should be properly relied upon by the Court. Plaintiffs are, of course, entitled their own opinions just as everyone is, but they are not entitled to their own set of facts. The facts are this and have been correctly recognized by Judge Scott, Valley will be able to process approximately 121 horses per day and an estimated net revenue of $180-$200 per head.

Further plaintiffs argue that Valley should just give up and process beef, but that assumes that Valley could transition back when in reality the lack of income due to the

injunction of this Court denies Valley ability to do anything other than sit at the mercy of the Court and await the conclusion of this wrongfully brought action. See *Second Declaration of Ricardo De Los Santos,* ECF Doc. #119.

Going even further, Plaintiffs misrepresent that because the damages are not realized they are speculative; Plaintiffs have incorrectly assumed that the numbers reached are not supported. Quite the contrary, the potential economic losses are supported by evidence not challenged by Plaintiffs in the form of sworn statements presented by affidavit and in any event Plaintiffs purposefully try to shield from the Court that they have never argued that they can't pay the bond commensurate with those damages. Nonetheless, it is important to note that the Court in evaluating the posting of a bond should err on the high side. As Judge Scott has correctly set the bond at $495,000.00 for 30 days as Valley and Responsible have requested, this does not necessarily *entitled* Valley and Responsible to that sum; they will still would have had to prove their numbers, converting the 'soft' numbers to hard ones. An error in setting the bond too high thus is not serious. An error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond." See *Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883, 888 (7th Cir.2000).

Plaintiffs misstate the law in hopes that if they offer enough citations to cases not on point that they will cover three major holes in their argument. The first of these holes is that they are serving a public interest by bringing this litigation and halting the lawful businesses of Valley and others, when in reality Plaintiff HSUS is really cloaking itself in

the sheep's clothing of public interest to promote its financial interests.[2] This case really isn't about NEPA for HSUS, FRER or the State of New Mexico, it is about stopping the processing of horses for consumption and to that end as one commentator has noted groups like HSUS "place[] a high value on NEPA because it affords extraordinary opportunities to throw up procedural roadblocks that delay or kill projects" that they oppose. Bradley C. Karkkanian, *Wither NEPA?,* 12 N.Y.U. Envt'l L.J. 333, 339 (2004) Because it opposes the substantive law supporting the lawful business of real parties in interest, Valley and Responsible, and because it stands to benefit financially Plaintiff HSUS along with the other plaintiffs uses NEPA litigation to bully those would oppose them out of business[3] in order to benefit financially from their absence.

Secondly, Plaintiffs repeatedly reiterate that because they have self-determined themselves to be a public interest group bringing what they deem to be public interest litigation that there is a mandatory rule or rather that the exception to Rule 65 (c) that some courts have found to excuse plaintiffs from a bound or require only a minimal bond is mandatory upon this Court, such that Judge Scott committed an error of law by not giving them the exception they demanded. What Plaintiffs fail to acknowledge is the particular reasoning behind the exception, from the various cases cited to by Plaintiffs from around the country, is to allow for public participants without the ability to pay to have the ability to bring a citizen suit to enforce the laws of United States. Plaintiff HSUS with a 2011 Gross Revenue of over $230,000,000.00 and assets valued in the hundreds of millions of dollars; FRER with 2011 Gross Revenues of over $2,000,000.00; and the State of New Mexico with its Gross Revenues in the **billions** simply are not

[2] http://www.humanesociety.org/issues/wild_horses/facts/hsus_wild_horse_management.html
[3] http://www.humanesociety.org/news/news_briefs/2013/08/iowa-responsible-transportation-drops-horse-slaughter-plans-081313.html

representative of Plaintiffs without the ability to pay for which the exception to the mandatory requirement of Rule 65 (c) was judicially crafted. And, unfortunately for Plaintiffs, Judge Scott did not error when he recognized the respective Plaintiffs' ability to pay and instead correctly balanced the ability of the parties seeking the bond to pay against the substantial economic harm that this Court has ready recognized will be visited upon Valley and others by this TRO. (and eventually by the preliminary injunction, should one issue from the Court) In the end, Valley has long since fulfilled its obligations under the law and as a law abiding business should suffer no further delay whether the fault of the Plaintiffs in this action or the Defendant US Government. However, until the determination of whether the injunction was properly issued is made this Court has correctly recognized the law and applied it protect a potentially innocent party.

The third hole in the arguments of Plaintiffs is that they fail to recognize that the Courts have recognized the public interest exception and weighed it against mandatory nature of Rule 65 by balancing the ability of the movant to pay against the harm to those enjoined. In fact, the 7th Circuit Court of Appeals has already evaluated this public interest exception and offered helpful guidance when it stated in *Habitat Educ. Ctr. v. United States Forest Serv.*, 607 F.3d 453,458 (7th Cir.2010) that they:

> **"especially wish to emphasize our rejection of the rule proposed by Habitat that nonprofit entities should be exempt from having to post injunction bonds, or a slightly narrower rule that would pick and choose among them on the basis of likely contribution to the overall public welfare. Preliminary injunctions, because issued before a full adjudication, often turn out to have been issued in error, and when that happens the costs imposed on the party against whom the injunction ran are costs incurred by an innocent person (at least innocent in the preliminary-injunction phase of the litigation). The innocent may be a private firm or a government agency or a hapless**

> **individual (or even another nonprofit), but that doesn't make it or him or her unworthy of the law's protection." *Id.* at 459.** (*emphasis added)*

As it stands Plaintiffs are now asking this Court to excuse them from their success in obtaining the relief they sought under Rule 65 claiming that the Court erred in granting them the relief they asked for upon the reasons the used to seek that relief. They were well aware that Rule 65 has a mandatory requirement and as Justice Stevens explained in *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) "[s]ince a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully. The bond, in effect, is the moving party's warranty that the law will uphold the issuance of the injunction." *Id.* at 649, 102 S.Ct. 2629 (Stevens, J., concurring in part and concurring in the judgment) (footnote omitted); *see also Northeast Airlines, Inc. v. Nationwide Charters & Conventions, Inc.*, 413 F.2d 335, 338 (1st Cir.1969) (explaining that a security issued under Rule 65(c) protects against damages "suffered by reason of the [wrongfulness] of [a] preliminary injunction"). If Plaintiffs are dissatisfied with their success in stopping the lawful business of Valley and stripping away its license to operate (Grant of Inspection) they could simply withdraw the case and allow the TRO to end on its natural course and go back to seeking the legislative remedy they have been unable to achieve thus far instead of bringing litigation that subjects themselves to the requirement to post a bond. Plaintiffs have stated that Valley and Responsible should have known that a lawsuit would be filed to interfere with opening of their lawful business and therefore the

damages that are being suffered under the injunction are "self-inflicted," but this puts the cart before the horse, Plaintiffs are well aware of the requirements of Rule 65 (c) and sought that remedy knowing full well that they may be subjected to the requirement to post a sufficient bond. Then and now, they still attempt to cloak themselves in public interest to hide their financial wherewithal and the own financial or political stakes in the outcome of interfering with the lawful business of others even as they took up the procedural sword of NEPA to harm Valley and others who disagreed with them on substantive policy issue as they were unable to achieve their misguided legislative agenda.

The Court should make no mistake, although Plaintiffs did not name Intervenors as parties against whom they were seeking a remedy, the remedy they sought was the "[s]etting aside any grants of inspection given to horse slaughter plants throughout the United States" *FRER First Amended Complaint for Declaratory and Injunctive Relief*, pg 40 #3 ECF Doc. 54, which is remedy born by Valley and other Intervenors. Those Grants of Inspection are the necessary permits or licenses that facilities obtain in order to be eligible for inspection by USDA FSIS which allows the business to operate. Whether explicitly in the Court's existing Order or implicit in an order directing the Defendant US Government to set aside the Grants of Inspection the result is still the same for Valley and Responsible. Their issued Grants of Inspection will be stripped away. Those Grants of Inspection which allow them to operate their business are no different than a business or professional license. And again, though not specifically named by Plaintiffs, Valley would suffer having its property interest removed without due process and without compensation if they were not to be considered by this Court as

the Real Parties in Interest suffering real harm in fact. Arguably, Valley and Responsible are not only necessary parties but also indispensable parties under the analysis normally associated with Rule 19, but in any event Plaintiffs fail to recognize that taking away an issued license has long been recognized by the US Supreme Court to require procedural due process. For instance, the 10th Circuit Court of Appeals citing the *Bell* case in *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144 (10th Cir., 2001) held that:

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment.
>
> Id. at 539. Expanding upon Bell, Justice Brennan subsequently declared that "[w]hat was said of automobile drivers' licenses in Bell v. Burson . . . is even more true of occupational licenses." Barry v. Barchi, 443 U.S. 55, 69-70 (1979) (Brennan, J., concurring). This court has previously suggested that in some circumstances Forest Service permits, once issued, may warrant such constitutional protection, see Fed. Lands Legal Consortium ex rel. E.A. Robart Estate v. United States, 195 F.3d 1190, 1200 (10th Cir. 1999), as well as licenses to sell beer, see Tanasse v. City of St. George, No. 97-4144, 1999 WL 74020, at *2 (10th Cir. Feb. 17, 1999).
>
> Thus, the revocation or removal of a license or certificate that is "essential in the pursuit of a livelihood" requires procedural due process under the Fourteenth Amendment. Bell, 402 U.S. at 539.

Id. at 1150. This present case is no different. Plaintiffs seek to use a procedural NEPA requirement to remove the Grant of Inspection needed to operate its business from Valley placing the Court or Defendant US Government in the position of potentially denying the procedural due process of the 5th Amendment to US Constitution afforded to Valley before the removal of its issued Grant of Inspection. Further, in seeking to enjoin the Defendant US Government from providing the Inspectors that are the right of Valley

under its Grant and which are necessary for the operation of its lawful business Plaintiffs seek to avoid having to post a bond for which they are capable paying that would cover the economic losses suffered by Valley in the uncompensated taking away of its issued Grant of Inspection should Plaintiffs arguments prove incorrect and the bond wrongfully issued.

The United States Supreme Court has addressed these types of NEPA injunctions in *Monsanto Co. v. Geertson Seed Farms,* 130 S. Ct. 2743 (2010) and found that it is not the law "to presume that an injunction is the proper remedy for a NEPA violation except in un-usual circumstance." 130 S. Ct. at 2757. If this Court believes that an injunction is proper then it is already correct in its analysis that a bond of an amount which Plaintiffs can easily pay to cover the harm-in-fact to the real parties in interest is appropriate and there is no basis for this Court modify its current Order or to reduce the bond.

CONCLUSION

For the above reasons, Valley Meat Company, LLC, Rains Natural Meats and Chevaline, LLC respectfully asks the Court to deny the Motion to Modify the Temporary Restraining Order and Objection to Magistrate's Order Requiring Injunction Bond.

Dated: August 21, 2013

By: *- Electronically Signed by –A. Blair Dunn*
A. Blair Dunn, (NM Bar #121395)
Attorney for Intervenor -Real Parties in Interest
Valley Meat Co., LLC, Chevaline, LLC and
Rains Natural Meats
6605 Uptown Blvd, NE Ste 280
Albuquerque, NM 87110
505-881-5155
F: 505-881-5356

CERTIFICATE OF SERVICE

I certify that I filed the foregoing documents on August 21, 2013 using the ECF System, which will send notification to all parties of record.

-Electronically Signed by – A. Blair Dunn
A. Blair Dunn, Esq.